



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 8, 1992

Mr. Don R. Lane
Attorney for the City of Pampa
Lane & Douglass
P. O. Box 1781
Pampa, Texas 79066-1781

OR92-593

Dear Mr. Lane:

You have requested clarification of part of Open Records Letter No. 92-526 (1992), pertaining to a Pampa Police Department investigation report. That decision stated that you may withhold the report based on section 3(a)(3) of the Open Records Act since it related to pending litigation in which the Pampa Police Department was a party.

You inform us that the report has been released to the opposing party in the pending litigation. Since the fact that the opposing party has obtained the report at issue means that the report is no longer afforded the protection of section 3(a)(3), you now ask if you may withhold the report or portions thereof based on the informer's privilege and to protect the privacy interests of two of the officers involved in the investigation.

The Open Records Act protects from required public disclosure information made confidential by judicial decision. See V.T.C.S. art. 6252-17a, § 3(a)(1). Thus, section 3(a)(1) incorporates the "informer's privilege," which has been recognized by Texas Courts. See *Aguilar v. State*, 444 S.W.2d 935 (Tex. Crim. App. 1969). The informer's privilege authorizes a governmental body to withhold from disclosure information that reveals the identity of persons who report violations of the law to officials charged with enforcing those laws. See Open Records Decision No. 515 (1988). While portions of the report disclose the identity of an individual who is reporting the possible violation of a law, we conclude that you may not withhold any part of the report based on the informer's privilege, since the subjects of the report, having obtained a copy of the report through the discovery process, already know the informer's identity. See Open Records Decision No. 208 (1978).

Section 3(a)(1) of the Open Records Act also protects information made confidential by common-law privacy and constitutional privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, section 3(a)(1) applies when disclosure of the requested information would result in a violation of the common-law tort of invasion of privacy through the disclosure of private facts. Information within the tort must (1) contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) be of no legitimate concern to the public. *Id.* at 685.

The report primarily contains information about the police officers' conduct at work -- information that is not private and that is of a legitimate public interest -- which you may not withhold as information deemed confidential by a common-law right of privacy under section 3(a)(1). See Open Records Decision No. 484 (1987) (overruled in part by Open Records Decision No. 579 (1990)). Part of Exhibit "C" of the report contains allegations that constitute private facts. However, notwithstanding its private character, we conclude that because the public employee in this case is a police officer, and because the information relates to the officer's job qualifications, these allegations are matters of legitimate public concern, even though the alleged acts occurred outside of the workplace. See Open Records Decision No. 484 at 6.

Two small portions of the report contain private information about two individuals who are not police officers under investigation. The public has no legitimate concern in this information. You must withhold this information pursuant to section 3(a)(1) as information protected from disclosure by the common-law right to privacy. We have marked the documents accordingly.

The right to privacy protected by the constitution has two aspects: (1) the interest in independence in making important decisions about matters within the "zones of privacy"--matters related to marriage, procreation, contraception, family relationships, and child rearing and education (autonomy); and (2) the right to control the disclosure of information about personal matters (disclosural privacy). *Industrial Foundation*, 540 S.W.2d at 679.

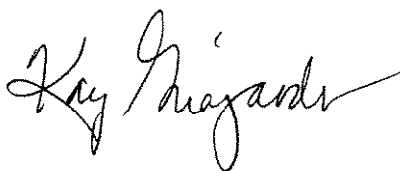
The investigation report contains no information within a "zone of privacy"; the first aspect of the constitutional right to privacy is not implicated. The test for violation of disclosural privacy requires a balancing of the individual's privacy interest against the public's need to know information of public concern. *Fadjo v.*

Coon, 633 F.2d 1172, 1176 (5th Cir. 1981). Further, this aspect of the right to privacy is violated only by disclosure of information involving the most intimate aspects of human affairs. *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985).

As mentioned above, most of the report does not concern the personal matters of the officers, but rather their conduct while on duty. The portion of Exhibit "C" which concerns conduct outside of the workplace contains information about the finances of one of the officers which fits into the category of constitutionally protected personal matters. See Open Records Decision No. 455 (1987) (citing *DuPlantier v. United States*, 606 F.2d. 654 (5th Cir. 1979), *rehearing denied*, 608 F.2d 1373.) However, as this information relates to the suitability of the officer to continue his employment as a police officer, the legitimate public interest in this information warrants its disclosure. See *id.* and authorities cited therein.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. This request for an open records decision was assigned ID# 17329. If you have questions about this ruling, please refer to OR92-593.

Yours very truly,

A handwritten signature in cursive script, reading "Kay H. Guajardo".

Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/lmm

cc: Ms. Candace Norris
Attorney at Law
P. O. Box 261
Canyon, Texas 79015

Ms. Virginia Ellen Daugherty
Daugherty and Associates
P. O. Box 15507
Amarillo, Texas 79105

Mr. J. Alan Brzys
The Pampa News
P. O. Drawer 2198
Pampa, Texas 79066